Thye Hin Enterprises Sdn Bhd v DaimlerChrysler Malaysia Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO K–02–124 OF 2004
MOHD GHAZALI, NIK HASHIM JJCA AND LOW HOP BING J
28 JULY 2004

Arbitration — Agreement — Reference of dispute — Parties referred disputes to arbitration — Appellant applied for injunction to preserve status quo of parties — Respondent raised preliminary objection pursuant to s 34 of Arbitration Act 1952 — Whether judge adopted correct approach in dismissing appellant's application — Arbitration Act 1952 s 34(1)

Civil Procedure — Injunction — Application for — Appellant applied for injunction to maintain the status quo pending arbitration — Whether injunction should be granted

The appellant and the respondent are parties to a dealership agreement dated 10 January 2003. The appellant was appointed as a non-exclusive dealer for the sale and service of new Mercedes Benz passenger cars, vans and transporters including new genuine parts and accessories distributed and supplied by the respondent. Disputes arose between parties and pursuant to article 17 of the dealership agreement the disputes was referred for arbitration at the Regional Centre for Arbitration in Kuala Lumpur ('KLRCA'). In the meantime, the appellant filed a writ action followed by an application seeking an interim injunction to preserve the status quo pending the decision of the arbitrators. The application was dismissed by the High Court judge upon hearing the preliminary objection raised by the respondent pursuant to s 34 of the Arbitration Act 1952 ('the Act'). Hence this appeal. The issue before this court was whether the learned judge adopted the correct approach in dismissing the appellant's application for interim injunction pursuant to s 34 of the Act.

Held, allowing the appeal:

(1) The steps to be taken by a judge hearing an application for an injunction at the interlocutory stage were whether the totality of the facts presented before him discloses a bona fide serious issue, where the justice of the case lies, the harm that the injunction would produce by its grant against the harm that would result from its refusal, applicant's financial position in order to meet his/its undertaking as to damages, whether the injunction would produce a just result for the period between the date of the application and the trial proper, delay in the making of the application, any adequate alternative remedy and public interest in appropriate cases; *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 followed (see para 8).

(2) The learned judge did not take the application before him through these stages despite the binding nature of the decision in *Keet Gerald*. This flawed the learned judge's decision. The issue whether s 34 of the Act bars interim injunctive relief altogether is in itself a serious question to be tried. The court agreed with the contention of the appellant's counsel that it was not open to the learned judge at this stage to have finally and conclusively decided the question (see para 9).

(3) Section 34 of the Act only excludes interference with the arbitration itself. The same does not prohibit the grant of interim relief pending the outcome of arbitration. As such, the grant of interim relief in this case was within the ambit of s 34 of the Act (see para 11).

[**Bahasa Malaysia summary**

Perayu dan responden adalah pihak kepada satu perjanjian urus-janji bertarikh 10 Januari 2003. Perayu telah dilantik sebagai peniaga tidak eksklusif untuk penjualan dan servis kereta-kereta penumpang Mercedes Benz yang baru, van-van, kenderaan-kenderaan pengangkutan termasuk aksesori-aksesori tulen yang diagihkan dan dibekalkan oleh responden. Pertikaian telah timbul di antara pihak-pihak dan mengikut perkara 17 perjanjian urus-janji tersebut pertikaian tersebut telah dirujuk kepada timbang tara di *Regional Centre for Arbitration* di Kuala Lumpur ('KLRCA'). Pada masa yang sama, perayu telah memfailkan satu tindakan writ yang diikuti dengan satu permohonan untuk injunksi interim bagi mengekalkan status quo sementara menunggu keputusan penimbang tara. Permohonan tersebut telah ditolak oleh hakim Mahkamah Tinggi selepas mendengar bantahan awalan responden menurut s 34 Akta Timbang Tara 1952 ('Akta itu'). Maka rayuan ini. Isu di hadapan mahkamah ini adalah sama ada hakim yang arif telah mengguna pakai cara yang betul dalam menolak permohonan perayu untuk injunksi interim mengikut s 34 Akta itu.

Diputuskan, membenarkan rayuan tersebut:

(1) Langkah-langkah yang perlu diambil oleh seorang hakim yang mendengar satu permohonan untuk injunksi di tahap interlokutori adalah sama ada keseluruhan fakta-fakta yang telah dikemukakan di hadapan hakim mendedahkan satu isu bona fide yang serius, di mana keadilan kes tersebut, kesan sekiranya injunksi tersebut dibenarkan dan kesan sekiranya injunksi tersebut tidak dibenarkan, kedudukan kewangan pihak yang memohon injunksi dalam memenuhi akujanji terhadap ganti rugi, sama ada injunksi tersebut akan mewujudkan satu keputusan yang adil daripada tarikh tempoh permohonan sehingga ke tarikh perbicaraan yang sebenar, kelewatan dalam memfailkan permohonan, sebarang remedi yang lain yang sesuai dan kepentingan awam dalam kes-kes yang sesuai; *Keet Gerald*

Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 diikut (lihat perenggan 8).

(2) Hakim yang arif tidak memakai langkah-langkah seperti itu walaupun keputusan Keet Gerald mengikat. Ini telah mencacatkan keputusan hakim itu. Isu sama ada s 34 Akta itu menghalang relif injunksi interim sama sekali adalah isu yang serius untuk dibicarakan. Mahkamah bersetuju dengan hujah peguam perayu bahawa ia bukan untuk hakim pada tahap ini untuk memutuskan persoalan itu dengan muktamad (lihat perenggan 9).

(3) Seksyen 34 Akta itu hanya mengecualikan gangguan terhadap timbang tara semata-mata. Seksyen tersebut tidak menghalang pemberian relif interim sementara menunggu keputusan timbang tara. Maka, pemberian relif interim dalam kes ini masih di dalam lingkungan s 34 Akta itu (lihat perenggan 11)]

Notes

For cases on reference of dispute to arbitration, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1087-1094.

For cases on application for injunction, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2464-2471.

For interlocutory injunctions, see 1 *Halsbury's Laws of Malaysia*, paras [10.5-027]–[10.5-035].

For reference to arbitration generally, see 13 *Halsburys Laws of Malaysia*, paras [220.001]–[220.007].

Cases referred to

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193 (folld)

Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd & Ors [1998] 2 MLJ 20 (refd)

Si Rusa Beach Resort Sdn Bhd v Asia Pacific Hotels Management Pte Ltd [1985] 1 MLJ 132 (refd)

Legislation referred to

Arbitration Act 1952 ss 25(2), 34

Specific Relief Act 1950 ss 20(1)(g), 54(f)

Appeal from: Civil Suit No 22–03 of 2004 (High Court, Alor Star)

Dato Dr Cyrus Das (Shamsul Baharin Manaf and T Jegadeeson with him) (Shook Lin & Bok) for the appellant.

DP Naban (Bahari Yeow with him) (Lee Hishammuddin) for the respondent.

Mohd Ghazali JCA (delivering judgment of the court): A

[1] This appeal is directed against the order of the High Court at Alor Star dismissing the appellant's application for injunctive relief. The dispute in this case revolves around a dealership agreement dated 10 January 2003 entered into between the appellant, as dealer and the respondent, as general distributor ('the said agreement') wherein the respondent appointed the appellant to be a non-exclusive dealer in the state of Kedah and Perlis for the sale and service of new Mercedes Benz passenger cars, vans and transporters including new genuine parts and accessories distributed and supplied by the respondent. B

[2] It is common ground that the said agreement provides for all disputes between the parties to be referred for arbitration to the Kuala Lumpur Regional Centre for Arbitration ('the Centre'). Article 17 of the said agreement provides: C

Governing Law and Dispute Resolution D

(1) This Agreement is made in and will be construed and governed in all respects in accordance with the laws of Malaysia.

(2) All disputes, controversies or claims arising from the interpretation, performance or non-performance of this Agreement or any and all transactions related to this Agreement (including, but not limited to, the validity, scope and enforceability of this provision, or disputes under rights granted pursuant to law) shall be finally and completely resolved by arbitration in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules as at present in force. The appointing authority shall be the Secretary-General of the Permanent Court of Arbitration at The Hague. The place of arbitration shall be Kuala Lumpur Regional Centre for Arbitration, where its rules and the UNCITRAL rules shall apply. The language to be used in the arbitral proceedings shall be English. E F

[3] It is not in dispute that steps have already been taken to have the dispute referred to arbitration at the Centre. Accordingly, s 34 of the Arbitration Act 1952 ('the Act') applies to the case. That section reads: G

(1) Notwithstanding anything to the contrary in this Act or in any other written law but subject to subsection (2) in so far as it relates to the enforcement of an award, the provisions of this Act or other written law shall not apply to any arbitration held under the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 or under the United Nations Commission on International Trade Law Arbitration Rules 1976 and the Rules of the Regional Centre for Arbitration at Kuala Lumpur. H

(2) Where an award made in an arbitration held in conformity with the Convention or the Rules specified in subsection (1) is sought to be enforced in Malaysia, the enforcement proceedings in respect thereof shall be taken in accordance with the provisions of the Convention specified in subsection (1) or the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, as may be appropriate. I

(3) The competent court for the purpose of such enforcement shall be the High Court.

[4] Pending the commencement of the arbitration, the appellant filed a writ in the High Court at Alor Star and by way of summons in chambers sought interim injunctive relief to preserve the status quo ('the application'). Although the foot of the writ oddly claims a declaration that the respondent's termination of the said agreement is invalid, a question eminently one for the arbitrators to decide, the interim injunction sought for seeks the preservation of the status quo pending the decision of the arbitrators.

[5] Prior to the hearing of the application, the respondent's solicitors gave written notice to the appellant's solicitors informing the latter that they will be raising a preliminary objection which was framed as follows:

> Please be informed that we intend to raise a preliminary objection before the Court that by virtue of *s 34 of the Arbitration Act 1952,* the interim relief sought by the [Appellant] in this case is not available to the [Appellant] as the law under which it is sought does not apply to an arbitration held under the UNCITRAL Arbitration Rules and the Kuala Lumpur Centre for Arbitration.

[6] After hearing submissions of counsel for the appellant and respondent, the learned judge upheld the preliminary objection raised by the respondent and dismissed the summons without entering into the merits of the application for interim relief. This is an appeal from that decision.

[7] Before this court, the only issue is whether the learned judge adopted the correct approach to the application before him. The respondent argued the learned judge was right in doing so on the face of s 34 of the Act. The appellant argued the learned judge was wrong. We are in agreement with the appellant.

[8] The steps to be taken by a judge hearing an application for an injunction at the interlocutory stage have been set out by this court in *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193. In that case, Gopal Sri Ram JCA said (at p 206):

> To summarize, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:
>
> (1) he must ask himself whether the totality of the facts presented before him discloses a bona fide serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;

(2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, inter alia, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as to damages (see *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee; and

(3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the status quo, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] AC 130; [1983] 2 All ER 770; [1983] 3 WLR 143 and applied in *Cheng Hang Guan*. It is a judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A judge should briefly set out in his judgement the several factors that weighed in his mind when arriving at his conclusion.

[9] In the instant case, the learned judge did not take the application before him through these stages despite the binding nature of the decision in *Keet Gerald*. This, in our view, flawed the learned judge's decision. The issue whether s 34 of the Act bars interim injunctive relief altogether is in itself a serious question to be tried. We would agree with the contention of the appellant's counsel that it was not open to the learned judge at this stage to have finally and conclusively decided the question. In *Si Rusa Beach Resort Sdn Bhd v Asia Pacific Hotels Management Pte Ltd* [1985] 1 MLJ 132, it was argued that no injunction could lie by reason of s 20(1)(g) of the Specific Relief Act 1950 read with s 54(f) of that Act. In delivering the judgment of the Federal Court, Abdul Hamid CJ (Malaya) (as he then was) said (at p 135):

> Mr RR Chelliah, counsel for the appellant urged upon us to consider two points of law to which he said the learned Judge only made casual reference in his grounds of judgment but neither dealt with nor applied them, (a) the appellant's contention

that by virtue of section 20(1)(g) of the Specific Relief Act 1950 which is reproduced hereunder:

> 20(1) The following contracts cannot be specifically enforced:
>
> ...
>
> (g) a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date;

the contract is clearly one that cannot be specifically performed, and (b) that in view of section 54(f) which we also reproduce hereunder:-

> '54 An injunction cannot be granted -
>
> ...
>
> (f) to prevent the breach of a contract the performance of which would not be specifically enforced;

this contract cannot be specifically enforced. It is submitted that if permanent injunction cannot be granted it follows that interim injunction cannot also be granted. Reference is made to *Vethanayagam v Karuppiah & Ors* [1968] 1 MLJ 283.

[10] On the facts of that case, s 20(1)(g) of the Specific Relief Act 1950 plainly applied. Nevertheless, Abdul Hamid CJ (Malaya) (as he then was) said at p 135:

> While we appreciate that these questions are crucial indeed they are the main grounds upon which the appellant's case rests, we do not, however, see the necessity at that stage for the learned Judge to decide on these difficult points of law.
>
> Suffice for the learned judge to decide, and this he did, that there are serious questions that have arisen for trial. While we agree that there are serious questions of law we are also of the view that these questions are relevant for consideration in determining the grant or otherwise of an interim injunction but the question is should it be the Court's business to resolve these serious and difficult questions of law at that stage of the litigation? We think not.

[11] Thus, in *Si Rusa*, the statutory provisions did not permit the grant of injunctive relief but yet the Federal Court held that that very issue was a serious question to be tried. We are of the opinion that a similar approach should have been taken in the instant case by the learned judge. It is to be noted that s 34 of the Act only excludes interference with the arbitration itself. It has no application to cases where interim relief is urgently required. In this context it is useful to quote from the article entitled *Issues Related To Arbitrations Conducted Under The KLRCA Arbitration Rules* by Sundra Rajoo [2003] 3 MLJ xlix, where the learned writer says (at pp lv–1vi) :

While the decision in *Jati Erat Sdn Bhd v City Land Sdn Bhd* [2002] 1 CLJ 346] is correct on the plain reading of s 34, it is unfortunate in another way as it extends the principle of non-interference by the courts in arbitrations conducted under the KLRCA Rules to situations where the relief sought from the court is not supervisory in nature but merely for interim preservation. This is especially so as art 26.3 of the KLRCA Rules specifically provides that a request for interim measures to a judicial authority shall not be deemed incompatible with an agreement to arbitrate. It would seem that the KLRCA rules recognize the need for court intervention in certain situations, particularly in emergency cases, and have made suitable provisions in this connection. Court intervention, by way of ordering interim measures of protection, is essential in urgent situations particularly when granting relief is beyond the jurisdiction of the arbitral tribunal or where the arbitral tribunal has not yet been constituted. The court in *Third Chandris Shipping Corp v Unimarine SA* [1979] QB 645 observed that it only takes a telephone call or telex message which could, within seconds of the service of the writ, put all liquid assets out of reach of the creditor.

The object of interim measures of protection is to support the arbitration by making it effective. This is to say, the court may intervene in support of arbitration by granting interlocutory injunctions. In this connection, in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 1 All ER 664, speaking for the House of Lords, Lord Mustill candidly stated that 'none of the terms of the Arbitration Act of 1950, apply to foreign arbitrations and that since these include s 12(6), the power conferred by s 12(6)(h) to grant an interim injunction is not available to the court in respect of foreign arbitrations such as the present'. He then authoritatively stated the law: '…the purpose of interim measures of protection … is not to encroach on the procedural powers of the arbitrators but to reinforce them, and to render more effective the decision at which the arbitrators will ultimately arrive on the substance of the dispute. Provided that this and no more is what such measures aim to do, there is nothing in them contrary to the spirit of international arbitration.' Their Lordships then upheld the proposition that interlocutory measures could be taken against a defendant within the jurisdiction of the English courts to protect the foreign arbitration.

[12] We are entirely in agreement with the views of the learned writer. In our judgment, the grant of interim relief pending the outcome of an arbitration held at the KLRCA is not prohibited by s 34 of the Act. We have read the judgment of this court in *Sarawak Shell Bhd v PPES Oil & Gas Sdn Bhd & Ors* [1998] 2 MLJ 20 which was referred to by learned counsel for the respondent and find that case readily distinguishable from the facts of the instant case. In that case the appellant was seeking to invoke s 25(2) of the Act which empowers the High Court to revoke the authority of an arbitrator or to restrain arbitration proceedings where the arbitrator is not impartial or where fraud is involved, something that is clearly prohibited by s 34.

[13] For these reasons, we would allow this appeal, set aside the order made by the learned judge and remit the application to the High Court at Alor Star

to be heard on the merits. The respondent must pay the costs of this appeal and the costs in the court below. The deposit is to be refunded to the appellant.

Appeal allowed.

Reported by Sugandra Rao